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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 907

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

CHARLES M. SPENCE,
THOMAS BOND,
Attorneys for Petitioner.

THOMPSON, MITCHELL, THOMPSON & YOUNG,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Eighth Circuit.

The Texas and Pacific Railway Company prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on November 27, 1946, affirming the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on December 16, 1946, when the said Court without opinion denied petitioner's petition for a rehearing (Record page 609).

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is unreported as yet. It will be found at page 589 of the Record herein.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; Title 28, U. S. C. A., Sec. 347). See cases cited under Reasons for Granting the Writ.

QUESTIONS PRESENTED.

1) The Mandatory Freight Accounting Rules formulated by the Railroad Accounting Officers Association provide for the submission of disputes over the interpretation and application of the Accounting Rules to the Interline Freight Accounting Arbitration Committee with the right to appeal to an Appeal Committee. Where these Committees decide that there is no violation of the Accounting Rules while a dispute exists over the legality of the divisions of a joint rate used in interline settlements, which dispute said Committees refuse to decide because it involves the determination of legal questions which are beyond their jurisdiction; is the carrier to whom they deny relief precluded from seeking redress in the Courts?

2) If the divisions claimed by such losing carrier are determined by the courts to be the correct divisions lawfully applicable to the shipments in question, can a "collecting" or "settling" carrier be required to account for them to prior lines in accordance with the accounting practices prescribed in the Mandatory Freight Accounting Rules, notwithstanding the fact that the Arbitration Committees denied relief?

3) Did the Illinois Lines have any legal right by unilateral action to terminate their agreement to accept a division of 6½¢ per cwt. out of the through rate applicable to these shipments and over the objection of the other participating carriers to arbitrarily exact a division of 10¢ per cwt.?

4) Did the divisions of the through rate involved in this case that were set out in the published Division Sheets, Claimant's Exhibits 21 and 22 (Record pages 102, 107), lawfully apply to these shipments?

5) Did the accounting rules and practices agreed to by petitioner and respondent herein require respondent to collect the freight to East St. Louis in accordance with these Division Sheets and account to petitioner for its division as therein set out?

STATEMENT.

The opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit here sought to be reviewed, affirmed the judgment of the United States District Court for the Eastern District of Missouri dismissing a claim filed by The Texas and Pacific Railway Company, petitioner herein, against St. Louis Southwestern Railway Company, respondent herein and debtor in the reorganization proceedings below. The claim seeks to recover $64,424.46, and interest, due petitioner as its agreed division of the through rate on certain shipments of crude oil moving from Wickett, Texas, to Whiting, Indiana (see Proof of Claim, Record pages 2 to 12).

The facts are as follows:

Petitioner operates a line of railroad from Wickett to Big Sandy, Texas. Respondent and its Texas subsidiary operate lines of railroad from Big Sandy to St. Louis, Mis-

souri, and East St. Louis, Illinois. The Alton Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Illinois Central Railroad Company and the Wabash Railroad Company, hereinafter called "the Illinois trunk lines," operate lines of railroad to connecting points with the Elgin, Joliet & Eastern Railroad Company that runs thence to Whiting, Indiana. These railroads all maintain through routes and interchange traffic on joint rates from Wickett, Texas, and other points to Whiting, Indiana, and other points. (See Stipulation of Facts, Sec. 1, Record pages 31, 32.)

About twenty years ago oil began to be produced in the neighborhood of Wickett on Petitioner's line in Western Texas and a movement developed in large quantities to Whiting, Indiana, and other refineries. To handle this movement a joint rate of 37¢ per cwt. was published applicable over the above routes from Wickett to Whiting effective November 24, 1927, Stipulation, Sec. 4 (Record page 33 and Record page 46), and C. Exh. 1 (Record page 49), later reduced to 32½¢ per cwt. effective September 18, 1928, Stipulation, par. 4 (Record page 35 and Record page 56), and C. Exh. 5 (Record page 57). This joint through rate of 32½¢ divided 6½¢ to the Illinois trunk lines, including the services of the Elgin, Joliet & Eastern Railroad Company, and the balance of 26¢, accruing for the services up to East St. Louis, divided 16.9¢ to Appellant and 9.1¢ to Appellee, including its Texas subsidiary. Stipulation, Sec. 4 (Record pages 35, 36 and Record page 61 et seq.), and C. Exh. 21 and C. Exh. 22 (Record pages 102 and 107).

The shipments in question all originated on Petitioner's line at Wickett, Texas, and in each instance through waybills were issued by Petitioner's agent at Wickett, Texas, to accompany the shipments. These waybills describe the shipment, the route of movement and showed destination

to be Whiting, Indiana. In other words, they were what is known as "through waybills" and if Petitioner's shipping instructions had been followed the shipments would have all gone through on these waybills to Whiting, Indiana, and the Elgin, Joliet & Eastern, as the waybill destination carrier, would have been required to collect the freight charges and distribute the revenue as between all carriers participating in the movement in accordance with their published divisions. The opinion below so concedes (Record page 593):

> "On shipments moving on through billing, freight charges collect, the destination carrier collects the charges from the consignee and accounts to prior carriers for their established divisions of the applicable rate. Appellant and appellee agree that the destination carrier on shipments moving on through billing is obligated under the Mandatory Freight Accounting Rules, as well as by law, to collect the lawful freight charges from the consignee, and is responsible to the other participating carriers for the distribution of the freight charges in conformity with an existing valid agreement for the division of the charges among them."

Respondent, however, failed to follow the shipping instructions as shown on the waybills accompanying the shipments but, on the contrary, when they arrived at East St. Louis, Respondent changed the heading on the waybills by striking out the words "Whiting, Indiana." and inserted in red ink the words "East St. Louis, Illinois," thereby changing the waybill destination of these shipments from Whiting, Indiana, to East St. Louis, Illinois. Respondent thereupon terminated the original waybills at East St. Louis and delivered the shipments to the Illinois trunk lines at East St. Louis on what was called "junction settlements," and the Illinois lines thereupon handled the shipments to Whiting, Indiana, on **new waybills** issued by them at East St.

Louis and covering the route of movement from East St. Louis to Whiting (Stipulation, Sec. 5, Record pages 37, 38; C. Exh. 35, Record page 175; Record pages 164-166-168). It is admitted that the purpose of Respondent in thus changing the waybill instructions, so as to terminate the waybills at East St. Louis, was to enable it to immediately collect the revenue accruing to East St. Louis so as to get ready cash that it then needed very badly wherewith to operate its railroad (Stipulation, Sec. 5, Record page 38, and Record pages 482, 518).

Under this "junction freight settlement plan" the Illinois lines receiving the shipments on junction transfer were required under the railroad accounting rules to advance and pay the proper revenue up to the junction point, and thus Respondent was enabled to make immediate collection of large sums which it otherwise would not have been able to collect from the Elgin, Joliet & Eastern R. R. Co. until the 25th of the following month (Record page 357; Rule 135, Record page 570; Rule 106, Record page 196). These collections during the period in question amounted to a very large sum of money (Record page 357).

In settling these waybills at East St. Louis with the Illinois trunk lines Respondent rendered freight bills to the Illinois trunk lines computed on the proper revenue of 26¢ per cwt., being the portion of the through rate lawfully accruing to East St. Louis. The Illinois trunk lines wrongfully and unlawfully cut these freight bills to 22½¢ per cwt. (Claimant's Exhibit No. 36, Record page 177). The facts establishing agreement on the part of the Illinois Lines to accept 6½¢ per cwt., and the circumstances involved in their breach of that agreement will be more fully stated in the supporting brief. Instead of proceeding to collect the balance of 3½¢ lawfully due, Respondent, after some protest, acquiesced in the cut, and undertook to

charge part of it back to Petitioner. This we contend it had no legal right to do and it is to recover the amounts so improperly charged back to Petitioner that this claim was filed.

The major railroads of the United States, including the parties hereto, maintain a set of accounting rules and practices known as Mandatory Freight Accounting Rules which, as the name implies, and the parties hereto have stipulated, and the evidence proves, control the settlement of all interline freight accounts (Record page 32 [3] and Record pages 162, 163).

Rule 118 (Record page 570) reads as follows:

> "Rule 118. Responsibility for Collection and Settlement of Waybills. The waybill destination carrier shall be responsible for the collection of the proper revenue to waybill destination, and for the proper reporting to all roads interested, regardless of the final destination of the shipment."

This rule, as will be more fully argued in the supporting brief, imposes upon the carrier making junction settlement (the waybill destination carrier) the same obligation to collect "proper revenue" to the junction point, as the opinion below concedes (see quotation, supra) rests upon the delivering carrier at final destination to collect the "lawful freight charges" on shipments moving on **through** waybills. In both cases the collecting carrier must settle the waybills, collect the revenue lawfully due, and account for it to prior lines regardless of whether collections have been accomplished (Rule 68, Record pages 561-568).

The Mandatory Freight Accounting Rules provide a procedure whereby disputes over the interpretation and application of the accounting rules may be submitted to the interline freight accounting Arbitration Committee for a

ruling. See Rules 272, 280, 281, 282, 300 and 301, Record pages 572 to 574.) However, the powers of these Arbitration Committees are strictly limited to the interpretation and application of the rules (Rules 272 and 280), they have no equity powers (Rule 281). It is a mere accounting procedure to obtain an interpretation of the rules and, as will be more fully argued under the heading "Reasons for Granting Writ," does not preclude actions at law or in equity to enforce legal rights and liabilities arising out of said rules.

There is authority for the view that resort to this arbitration was implied in the Mandatory Freight Accounting Rules to which the parties hereto have agreed, and hence was a condition precedent to any right of action in court (6 C. J. S., Arbitration and Award, Section 29, page 169). Therefore, when Respondent refused to embody Petitioner's "Statement of Differences" in a "Correction Account" (Rule 79, Record page 569) we submitted the following issue to the Arbitration Committee, to-wit (Record page 327):

> "Issue to Be Determined.
>
> "28. The issue to be determined is whether the St. Louis and Southwestern Railway shall issue a correction account in accordance with Texas and Pacific Railway statements of differences allowing the Texas and Pacific Railway $64,536.36."

In so doing we thought that the action of the Illinois lines was so arbitrary and in violation of the Act to Regulate Commerce (49 U. S. C. A., Sec. 15 [6]) as well as of elementary principles of contract law, that the Arbitration Committee could say that there was no legitimate dispute about the divisions, and that the Illinois lines having published their participation in the 32½¢ joint rate (Record pages 59-60), the published Division Sheets (C. Exh. 21,

Record page 102, and C. Exh. 22, Record pages 103-105 and 107), reflecting the prior divisional agreement would apply until changed by carrier agreement or action of the Interstate Commerce Commission, and thus the Arbitrators could require Respondent, the waybill destination carrier who settled these waybills, to account as in ordinary cases where the divisions were agreed upon.

The Arbitrators, however, refused to admit this premise. They held that a divisional dispute existed and that they were without jurisdiction to settle it. They did **not** decide, as inadvertently stated in the opinion below, that "neither Rule 118 or 79 had any application on the question before them * * * and this without regard to ultimate decision of that dispute by the courts and by the Commission" (Record page 599).

The most that they can be said to have ruled is that **while** this dispute existed there was no violation of the accounting rules in accepting what revenue the Illinois line tendered (Rule 143, Record page 571) and in distributing it "on a reasonable basis pending adjustment when correct divisions are ascertained" (Rule 107, Record pages 569 and 570).

The decision of Arbitrator Tague makes this clear (Record page 269), to-wit:

> "From the foregoing it is my conclusion that **while** the question of these divisions were in dispute and the subject matter of correspondence between Traffic Departments of the roads involved, the Illinois Freight Association, and the Interstate Commerce Commission, there was no violation of mandatory accounting rules."

Such a ruling did not settle the matter. It left open the dispute itself, to-wit: whether or not the division sheets (C. Exh. 21 and C. Exh. 22) applied to these ship-

ments, and also left open the issue of how and by whom this so-called dispute was to be settled and the "proper revenue" collected. These issues were controlling, they were the crux of the case, and the arbitration committees left them entirely undecided. This record shows that Respondent contended all through the arbitration proceeding that the above issues were "for the courts to decide" and that "the arbitration committee has no jurisdiction over the issue raised by The Texas and Pacific Railroad Company." (See extracts from Respondent's briefs, Record pages 332, 333.) The arbitration committee agreed with Respondent, Arbitrator Price pointing out that appellant "may have legal rights in court" (Record page 331).

We have, therefore, a situation where the arbitrators' interpretation of the rules left the matter unsettled and undecided, because it involved the determination of legal questions over which they had no jurisdiction. In such cases all the authorities hold that resort may be had to the courts [6 C. J. S., Sec. 95, page 241, Notes 54-55; 6 C. J. S., Sec. 96 (b), page 242, Note 68; 5 C. J. 162, Notes 76-77].

Nevertheless, the opinion below ruled (Record pages 599, 600) that

> "The controlling issue in the case having been submitted to arbitration and decided, the decision of the arbitrators is binding on the courts."

Such a ruling we submit is untenable and in conflict with the weight of authority.

Such further facts as are necessary will be stated under Reasons for Granting the Writ and in the argument in the brief supporting this petition.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred

1) in holding that the controlling issue in the case had been submitted to arbitration and decided.

2) in holding that the decisions of the Arbitration Committees adjudicated petitioner's rights under the established accounting rules and practices.

3) in refusing to decide the issue of the legality of the action of the Illinois lines in exacting a division of 10¢ per cwt.

4) in refusing to hold that the Illinois lines were only entitled to a division of 6½¢ per cwt. on the shipments in question.

5) in refusing to hold that the "proper revenue" lawfully accruing to East St. Louis was 26¢ per cwt.

6) in refusing to hold that respondent was responsible for the collection of 26¢ per cwt. on these shipments.

7) in refusing to hold that petitioner was entitled to a division of 16.9¢ per cwt. on the shipments herein and that respondent was obligated to account to petitioner therefor.

8) in refusing to hold that petitioner was entitled to recover the amount of this claim and interest.

REASONS FOR GRANTING WRIT.

A.

The Circuit Court of Appeals Has Decided Important Questions of Law in a Way That Is Untenable and in Conflict With the Weight of Authority.

1.

An immense amount of traffic moves annually over the railroads of the United States on joint rates. The col-

lection, division and interline settlement of the revenue accruing from these joint rates involves a tremendous amount of accounting. To simplify this problem and provide a uniform procedure, the Railway Accounting Officers' Association formulated, and the major railroads of the United States have accepted and agreed to, a set of Mandatory Freight Accounting Rules that, by their terms, are **mandatory** and **binding** on all railroads of the United States members of the Association, including all the railroads participating in the shipments involved in this case (Rule 1, Record page 567, and testimony of Oliver, Record pages 162-3).

Literally billions of dollars of revenue is annually collected and accounted for under the provisions of these rules.

These rules place the responsibility upon the waybill destination carrier to collect and account for the "proper revenue to waybill destination regardless of the final destination of the shipment" (Rule 118, Record page 570). East St. Louis was the waybill destination and respondent was the waybill destination carrier (Record, bottom page 193 and page 194). The legal effect of the accounting rules and practices involved in this case has never been authoritatively determined, nor has there been any authoritative decision as to the scope and effect of the decisions of the Arbitration Committees in cases of disagreement over the interpretation of the rules (Rule 272, Record page 572). These questions are of prime importance to all the railroads of the United States whose interline settlements are governed by these Mandatory Freight Accounting Rules. These questions are novel and the Circuit Court of Appeals has decided them in a way that is untenable, and in conflict with the principles of the common law and the weight of authority, and we submit that the matter is of sufficient importance to call for the exercise of the

supervisory power of this Court. Even in cases where the decision sought to be reviewed does not conflict with other decisions, this Court has granted certiorari solely "because of the nature and importance of the case" (Mackay Radio & Telegraph Co. v. Radio Corp., 306 U. S. 86, l. c. 89, and compare Cyclopedia of Federal Procedure, 2d Edition, Vol. 11, Sec. 5413, footnote 44).

The Court of Appeals has wholly misconceived the effect of the decisions of these Arbitration Committees. The procedure in the Mandatory Freight Accounting Rules for submitting disagreements over the interpretation of the Rules to the Arbitration Committees, is no different than the familiar provision in ordinary contracts for the submission of certain questions such as quality, quantity, price, etc., to arbitration, and such provisions are held to be implied conditions precedent to any right of action in Court. In such cases resort to arbitration does not preclude court action, but is a condition precedent to such action. (6 C. J. S., Arbitration and Award, Sec. 29, page 169; Palmer v. Fix, 286 Pacific [California] 498, Syll. 11, l. c. 501, par. 11.)

The Arbitration Committees in this case did not by interpretation limit in any way the obligation placed on the waybill destination carrier by Rule 118 to collect the proper revenue. All that they decided was that while that revenue was in dispute there was no violation of the Mandatory Freight Accounting Rules in failing to account for it. The decision of Arbitrator Tague (Record page 269) is typical (see quotation supra under heading "Statement"). Such a decision did not settle the matter. It expressly left open the dispute itself, to-wit: the legality of the action of the Illinois lines in arbitrarily increasing their divisions, and it left open the further question of whether or not it was respondent's duty under established accounting rules and practices to collect this illegal exac-

tion from the Illinois lines, and account to prior lines in accordance with their agreed divisions. These were the controlling issues, and the Arbitration Committees did not decide them. The reason they left them undecided was because they considered them to be legal questions and hence beyond their jurisdiction. The decision of Arbitrator Price is typical and makes this clear (Record page 331).

> "Question (4). Under the mandatory rules are the Arbitration Committees of this Association authorized to pass upon the **legality** of the divisions used in interline settlements **or** the **legal rights** of the interested parties in an arbitration case of this kind? Answer. It is **not** understood that the Arbitration Committee, or the Appeal Arbitration Committee, is vested with such authority.
>
> "In view of all facts and evidence as shown in the papers, I agree with the unanimous decision of the arbitrators, and it is the decision of this appeal arbitrator that while the Texas & Pacific Railway Company may have had the right to present the case to the Interstate Commerce Commission, **or may have legal rights in court**, it has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association. The Texas & Pacific Railway Company should, therefore, assume the arbitration and appeal fees in accordance with the requirements of Mandatory Rule 300, effective January 1, 1936."

Counsel for respondent conceded, in fact argued, all through the arbitration that the Committees had no jurisdiction of the issues involved in this claim. We quote the following from respondent's brief before the Arbitration Committees:

The first brief respondent filed said (Claimant's Exhibit 26, Record pages 332, 318):

> "The Arbitration Committee has no jurisdiction over the issue raised by the Texas and Pacific Railway."

And in its reply brief it said (Claimant's Exhibit 26, Record pages 332, 281):

> "Whether the Illinois Lines' refusal to observe the 6.5¢ division constituted an illegal act cannot be decided by the Arbitration Committee, the Texas and Pacific or the St. Louis Southwestern Railway Lines. **That is a question for the courts to decide.**"

And further on the same page it said (Record pages 332, 281-2):

> "The rate of 32½¢ was not established until September 18, 1928, and until some court of competent jurisdiction has decided whether the agreement of the Illinois Lines to accept 6.5¢ out of the rate is enforceable by law, the disagreement must of necessity be considered a dispute between Traffic Departments."

And the brief concludes (Record pages 332, 288):

> "There are no issues to be determined by this Committee. It is unnecessary to repeat the conclusion shown in our original brief. The arbitration should be dismissed at the cost of the Texas & Pacific."

In its brief on appeal respondent said (Claimant's Exhibit 46, Record pages 332, 234):

> "Arbitrators are not judges of the law. They are governed solely by the arbitration agreement and by accounting rules; quotations of decisions of the Supreme Court, or other courts, are irrelevant and immaterial."

Also in the same brief respondent said (Claimant's Exhibit 46, Record page 238):

> "No contention is here made that the agreement of the railroads which are members of the Association of American Railroads is not binding, but we do contend that such rules must be strictly construed, and that jurisdiction is not conferred thereby to adjudicate matters of law."

And the brief concludes (Claimant's Exhibit 46, Record pages 333, 243):

> "Nothing in the arbitration act requires the arbitrators to decide questions of law. The Texas & Pacific Railway Company has had its decision. If it desires to litigate **the courts have not ceased to function.**"

Other statements to the same effect can be found elsewhere in respondent's brief before the arbitrators, and Mr. Barrett, whose name is signed to these briefs, while testifying in this case expressed the opinion that the arbitrators are without jurisdiction to decide disputes over divisions (Record page 488).

The arbitrators agreed with respondent and ruled in effect that the application of the published division sheets to the shipments in question was a legal question that they were without jurisdiction to decide.

In short, both committees refused to hold respondent to the accounting rules because the application of those rules depended upon the legality of the action of the Illinois Trunk Lines in cutting debtor's freight bills at East St. Louis, a legal question which they held they were without authority to decide.

It is thus apparent that the issues involved herein were in the opinion of both arbitration committees not within their jurisdiction and they refused to decide them, and we contend the trial court so found (see Finding of Fact No. 5, Record page 576), to the effect that the issue of the legality of the action of the Illinois Lines, and the question of the proper revenue accruing to East St. Louis, were not decided by the arbitrators in the arbitration proceedings.

The law is settled that under the above circumstances the award is not conclusive and does not preclude resort to the courts. (See 6 C. J. S., Sec. 95, page 241, Notes 54 and 55, where it is said:)

> "Of course an award cannot be conclusive or binding as to matters which the arbitrators **have no authority to decide**, or which cannot properly be regarded as included in the award (See Supra Sec. 80), **nor as to matters on which the arbitrators do not intend to render a final or binding** decision. Hence an award **is not conclusive as to questions of law**, which it, by its terms, refers to the decision of the court, **either declining to decide them**, or deciding subject to such court revision."

Also: 5 C. J. 162, Notes 76 and 77:

> "So an exception to the general rule making awards conclusive arises where the award by its terms refers questions of law to the decisions of the court, either declining to decide them, or deciding them subject to such revision. Under these circumstances the court will revise the award because, if erroneous in law, it necessarily follows that it is not what the arbitrators intended."

Also: 6 C. J. S., Sec. 96 (b), p. 242, Note 68, where it is said:

> "Where the arbitrators refuse to consider a claim because they deem it not to be within their jurisdiction under the submission, such claim may properly be made the basis of an action."

We submit, however, that if this court decides the published division sheets were legally applicable, then it is perfectly apparent from all the opinions in the arbitration proceeding that petitioner **would** have a cause of action under the accounting rules.

Therefore we submit the trial court's conclusion of law No. 3 (Record page 577) to the effect that the award of

the Arbitration Committees adjudicated petitioner's rights under the rules is untenable, and the decision of the Court of Appeals affirming that ruling is likewise untenable.

We further submit that the opinion below creates uncertainty and confusion. All of the major railroads of the United States use these Mandatory Freight Accounting Rules, and they are left in a state of uncertainty as to how far their legal rights are prejudiced by the decisions of these Arbitration Committees. If the carrier whose revenue is withheld brings suit it will be said that under the Mandatory Freight Accounting Rules arbitration is a condition precedent, and failure to submit the dispute to an arbitration committee bars the suit. If, on the contrary, the carrier submits the matter to an arbitration committee and that committee, as in this case, because of its limited jurisdiction, cannot decide the issue, then the opinion below would preclude any resort to the courts. Such a situation is obviously illogical and untenable, and when we consider the enormous amount of traffic that moves annually under joint rates, and the immense sums of money that waybill destination carriers must distribute annually in interline settlements, it is clearly of the highest importance that the obligations of these settling carriers to prior lines be authoritatively determined, and we submit that it properly calls for the exercise of the supervisory power of this Court.

II.

The opinion below further rules (Record page 592), to-wit:

> "If we concede for the argument that appellant is correct in its contention that the lawful rate on crude petroleum from Wickett to Whiting was 32.5 cents, in which the Illinois Trunk Lines were bound by contract with appellant and appellee to participate for a

> **division of 6.5 cents, a question which we do not decide, it would seem that appellant's remedy was an action against the Elgin, Joliet & Eastern, the carrier which collected all freight charges, for the recovery of the lawful division of the established rate."**

This would be correct if the shipments had gone through on through waybills and the delivering carrier at final destination (E. J. & E.) had been the settling carrier. It is not correct where the waybills terminated at a junction point short of final destination and the inbound carrier at the junction (respondent) is the settling carrier [C. Exh. 45, Definition (14), Record page 212 and Record bottom page 200). In such case the established accounting rules and practices require the inbound carrier at the junction to collect and the outbound carrier at the junction to pay the proper revenue accruing to the junction (Rule 135, Record page 570) and this carrier (respondent) must account to the initial line (Rule 118, Record page 570). The outbound movement from the junction is a separate transportation movement under a new waybill (Record pages 171-172) and the destination carrier in that waybill accounts only to lines engaged in the movement from the junction to final destination (Record page 171 et seq. and C. Exhs. 42 and 43, Record pages 189 and 191). The final destination carrier is not required to account to lines up to the junction point. We will argue this point, that we are not required to sue the E. J. & E. for the accounting and that we are entitled to an accounting from respondent, in our supporting brief. The above is an important question which has not been, but should be decided by this Court. A great deal of traffic is handled every year on these junction settlements all over the United States, and it would seem to be important to have it authoritatively determined whether or not an initial carrier can look to a settling carrier at the junction for its division or, as the opinion below decides, must pursue some distant carrier at final destination.

B.

The Questions of Local Law Involved in This Case Are Important, and the Circuit Court of Appeals Has Decided Them in a Way That Is Untenable and Therefore Probably in Conflict With the State Law as Yet Unannounced by the Supreme Court of Missouri.

This court has indicated that such a situation warrants certiorari (Ruhlin v. New York Life Insurance Company, 304 U. S. 202, Syll. 4, l. c. 206). This claim was filed in the bankruptcy proceedings pending in the United States District Court for the Eastern District of Missouri for the reorganization of respondent railroad (11 U. S. C. A., Sec. 205), and the Missouri law should have been applied. The Supreme and Appellate Courts in Missouri have not as yet had occasion to decide the questions of law involved in this case. As we have indicated above and as the supporting brief will more fully develop, the Circuit Court of Appeals has decided the question of petitioner's legal right to hold respondent responsible for the collection and accounting to it of its agreed division out of the joint rate, and the question of the scope and effect of the decisions of the Arbitration Committees, in a way that is untenable, and in conflict with agreed upon accounting rules and practices, and in conflict with the weight of authority. It cannot be assumed that the Missouri Courts would so erroneously rule, and we say therefore as did this Court in Ruhlin v. New York Life Insurance Company (Supra, l. c. 206), "the decision below was 'probably untenable' and therefore probably in conflict with the State law as yet unannounced by the highest court of the State" and certiorari should be granted.

C.

The Case Presents an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Questions 3 and 4 stated supra under the Heading "Questions Presented" involve an important question of Federal law as to whether or not under the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4 and Sec. 15, Par. 6), the Illinois Lines could legally establish a division of 10¢ per cwt. by the method they pursued in this case. Under point 1 of the argument in the supporting brief, we state the argument against the right to so establish a division of a joint rate. The opinion below refused to decide this question (R. 597, 598).

The exact question here presented has not been decided by this court. It involves an interpretation of the above sections and paragraphs of the Act to Regulate Commerce which is, of course, a Federal question. The correct decision of this question is a matter of great importance to all railroads whose rates and divisions are subject to Federal regulation and we submit certiorari should be granted.

PRAYER FOR WRIT.

Wherefore, petitioner prays that this court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceedings in the cause numbered and entitled on its docket as No. 13346 in Bankruptcy, the Texas and Pacific Railway Company, Appellant, v. St. Louis Southwestern Railway Company, Debtor, Appellee, and that said judgment of

the said United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

CHARLES M. SPENCE,
THOMAS BOND,
Attorneys for Petitioner.

THOMPSON, MITCHELL, THOMPSON & YOUNG,
Of Counsel.

BRIEF

In Support of Petition for Writ of Certiorari.

The **statement of the grounds of jurisdiction**, the **statement of the case**, and the **specification of errors**, required by Rule 27, are all set out in the foregoing petition for certiorari.

SUMMARY OF THE ARGUMENT.

It is the contention of petitioner that when the joint through rate on crude oil from Wickett, Texas to Whiting, Indiana was established there was complete agreement among participating carriers on their respective divisions, and that under this agreement the division accruing to the Illinois lines for their entire service from East St. Louis to Whiting was 6½¢ per cwt. and that this basis remained in effect until superseded by a new agreement published July 1, 1931 (Record pages 119, 147), after all of these shipments had moved. That the attempt of the Illinois lines over the objection of the other participating carriers to increase their division to 10¢ per cwt. was wholly arbitrary and unauthorized and did not result in establishing 10¢ per cwt. as their lawful division. That the portion of the 32½¢ rate legally accruing to East St. Louis was 26¢ per cwt. and that there was complete agreement between petitioner and respondent on the division of this 26¢, to-wit: 16.9¢ per cwt. to petitioner and 9.1¢ per cwt. to respondent. We contend that by changing the destination named in these waybills from Whiting to East St. Louis respondent made itself the waybill destination carrier, and hence the settling carrier, as respects revenue accrued to that point, and that under the accounting rules and practices to which respondent had agreed it was bound to collect the proper revenue to East St. Louis, to-wit: 26¢ per cwt., and that

whether it actually collected the full amount or not, absent a showing that the full amount was uncollectible, it was bound to account to petitioner for 16.9¢ per cwt. in accordance with its division agreement with petitioner.

Petitioner contends further that the submission of a disagreement over the interpretation of the Mandatory Freight Accounting Rules to the Arbitration Committee, does not preclude Court action to enforce legal liabilities created by those rules, and by agreed accounting practices.

Petitioner further contends that the said Arbitration Committees by reason of their limited jurisdiction were unable to decide and did not decide the controlling questions of law between petitioner and respondent herein, and that their award does not control the decision of this case. And finally that the questions presented by this record are important and warrant certiorari as indicated in Supreme Court Rule 38 (5) (b) and previous decisions of this Court.

ARGUMENT.

I.

The Illinois Lines Had No Legal Right by Unilateral Action to Terminate Their Agreement to Accept a Division of 6½¢ Per Cwt. Out of the Through Rate Applicable to These Shipments and Over the Objection of the Other Participating Carriers Exact the Division Arbitrarily Fixed by Them at 10¢ Per Cwt.

The above is an important question of Federal law arising out of section 1 (4) and section 15 (6) of the Act to Regulate Commerce (49 U. S. C. A., sec. 1, par. 4, and sec. 15, par. 6).

The evidence in this case conclusively proves that at the time the through rate of 37¢ per cwt. was established the Illinois lines agreed to accept 20% of the Fort Worth rate,

which was then 32½¢ for their service from East St. Louis to Whiting. This was a basis of long standing whereby the Illinois lines received a division over East St. Louis on crude petroleum from Texas points equal to 20% of the Fort Worth rate (Record pages 133 and 325 et seq.). The Illinois lines expressly agreed to this basis and agreed specifically that their division would be 6½¢ per cwt. (See C. Exhs. 6, 6 [1], 6 [2] and 6 [3], Record pages 62, 64, 65 and 67, and C. Exhs. 7, 8, 9 and 10, Record pages 70, 71 and 72; C. Exh. 11, Record pages 76 and 77.) It will be noted that the above divisional basis was **not** conditional on the amount of the rate from Wickett to Whiting. This agreed divisional basis was not changed when the rate from Wickett to Whiting was reduced to 32½¢. The entire reduction was absorbed by Petitioner. There was no reduction in the division accruing to the Illinois lines (Record pages 119-120). When a carrier like Petitioner has traffic originating on its line and finds it necessary to grant rate reductions in order to satisfy shippers or to meet competition it discusses the reduction **only** with the carriers whose revenue (divisions) will be affected. It can be assumed that other participating carriers will be satisfied as it is all to their benefit, the reduction holds the traffic to their rails without cost to them. Hence the Illinois lines not being asked to share in the reduction were not consulted, nor was it customary that they be consulted (D. Exh. 12 [a], Record pages 419 and Record pages 119 and 120). The Illinois lines made no objection to the reduction and in fact **duly published their participation in the reduced rate** (Record page 60), without negotiating any agreement with the other participating carriers on any change in the divisional basis.

The law provides a procedure whereby a carrier dissatisfied with its division of a joint rate may obtain relief if so entitled. Par. 4 of Sec. 1 of the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4) requires carriers to

establish divisions of joint rates. When upon complaint the Commission is of the opinion that such divisions are unjust and unreasonable, it may by order prescribe divisions (49 U. S. C. A., Sec. 15 [6]). Or the Commission may, "upon its own initiative," institute an inquiry and prescribe divisions (49 U. S. C. A. 15 [6]). Or where, as in this case, the joint rate was voluntarily established by the carriers, any participating carrier is at liberty at any time to withdraw its participation if dissatisfied with its division. In this case, however, instead of withdrawing concurrence in the rate or filing a complaint with the Interstate Commerce Commission, the Illinois lines resorted to force.

On August 6, 1928, they caused C. W. Galligan, Chairman of the Illinois Freight Association, to address a notice to the southwestern lines entering St. Louis to the effect that they would no longer be bound by the divisional agreement, and that on and after August 15, 1928, they would require a division of 10¢ per cwt. (Record pages 120 to 123), and over the protest of the southwestern lines to whom this notice had been addressed, they carried out this threat. On shipments moving after this date on the 37¢ rate they only advanced 27¢ to cover the service up to East St. Louis instead of 30½¢ to which they had agreed and which, up to this time, they had paid. (See Statement in lieu of Debtor's Exhibit 74, Record pages 512, 513.) After September 18, 1928, when the reduced rate of 32½¢ became effective, they continued to withhold this additional 3½¢, and only advanced 22½¢ on junction settlement for the service up to East St. Louis instead of 26¢ as per the agreed divisional basis (see Stipulation of Facts, Record page 37) and on through shipments retained 10¢ for the service north of East St. Louis, and only accounted for 22½¢ for the service up to East St. Louis. (See Statement in lieu of Debtor's Exhibits 37 [c], 37 [d], 37 [e], 37 [f], Record page 501.) Such action on the part of the Illinois lines was

in violation of their contract and gave them no right to the additional revenue that they withheld, and this court has so ruled in the case of Alton R. Co. v. United States (287 U. S. 229).

In that case grain from the West moved into Peoria in large quantities on local rates. It was there stored in elevators, much of it milled or otherwise processed and the grain products moved out to eastern points on so-called "reshipping rates." The Alton participated in this outbound movement from Peoria to connections with eastern lines at Chicago, Dwight or Joliet, and its divisions were fixed by agreement with the eastern lines and duly published in division sheets. Starting July 1, 1929, the eastern lines over the protest of the Alton started reducing its divisions. The eastern lines were physically in a position to do this because being the waybill destination carriers they collected and distributed the freight. In holding that they were legally without power to reduce the Alton's division the Supreme Court said, l. c. 235 and 236:

> "The joint 'reshipping' rates and the divisions thereof were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of Sec. 15. **The connecting carriers were legally without power to reduce the divisions of the Alton over its objection.** If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it."

So in this case the Illinois Trunk Lines were "legally without power to reduce" the revenue accruing to origin and intermediate lines up to East St. Louis. If they were dissatisfied with their divisions north of East St. Louis they should have followed the orderly course of either withdrawing their participation in the rates, or they should have filed a complaint under Sec. 15 (6), supra, of the Act to Regulate Commerce. Instead of following either of the above orderly courses they resorted to force, and we submit that under the express language of the above decision of this Court Respondent had a plain right of action against them. (See also Atlantic Coast Line R. Co. v. Boston & Maine R. Co., 18 F. S. 886, Syll. 5, l. c. 891; 13 C. J. S., sec. 300, page 691.)

We submit that the Court of Appeals should have decided this important question of Federal law, and if it had done so in accordance with the above decision of this Court in the Alton case, it would follow that the Illinois lines were entitled to only 6½¢ per cwt., and that the amount they were required to pay Respondent on junction settlement at East St. Louis was 26¢ per cwt.

II.

Both at Common Law and Under Accounting Rules It Was Respondent's Duty to Collect and Account for 26¢ per cwt. on Junction Settlement With the Illinois Lines at East St. Louis.

It has always been the law that the collecting carrier, by which is meant the carrier who collects and disburses the freight charges, must account to prior lines for their agreed divisions. It was so ruled in the Alton case, supra (287 U. S. 229), where the lines connecting with the Alton reduced the Alton's division. This Court said (l. c. 236), "the connecting carriers were legally without power to reduce the division of the Alton over its objection" and that "the Alton might have sued at law for the part of the

divisions wrongfully withheld" (citing cases) and see also Atlantic Coast Line R. Co. v. Del. & H. R. Corp., 86 Fed. (2) 721, l. c. 723, para. 1.

The reason for this rule of law is the same whether the freight charges be collected by the delivering carrier at final destination, or by the waybill destination carrier at a junction point who makes delivery to a connecting carrier at the junction on junction settlement. In both cases the carrier so making the delivery **collects the freight charges** and is the collecting carrier to whom prior lines may look for an accounting. Mandatory Freight Accounting Rule 118, Record page 570, is but declaratory of this common law rule. By its own act in changing the destinations on these waybills, Respondent made itself the collecting carrier of that portion of the joint rate accruing up to East St. Louis, therefore under the express terms of the Rule, as well as by law, it is "responsible for the **collection** of the **proper revenue**, and for the proper reporting to all roads interested," and this, **regardless** of the fact that the junction point was not the final destination of the shipments. We submit that Petitioner is entitled to hold Respondent to this responsibility.

We pointed out in point II under the heading "Reasons for Granting Writ" that we had no right to an accounting from the E. J. & E. These shipments moved out of **East** St. Louis under **new waybills** issued by the Illinois Trunk Lines, and the E. J. & E., the destination carrier on those waybills, was only required to account to the carriers shown on those waybills as involved in the movement East St. Louis to Whiting. C. Exhs. 35 to 43, Record pages 175 to 193, are samples of the billing and accounting used on these shipments. Ex. 40 is the new waybill issued by the Illinois Trunk Lines at East St. Louis and C. Exhs. 42 and 43 show the accounting between the E. J. & E. and the carriers parties to the movement shown on the new way-

bills. It will be noted that Petitioner received no accounting from the E. J. & E. On the contrary, the whole record shows that such accounting as we received came from Respondent. The entire 14.625¢ per cwt. that Petitioner received on these shipments was all paid to it by Respondent. None of it was paid to Petitioner by the E. J. & E. There was no privity between Petitioner and the E. J. & E., and we do not believe we could have maintained an action against it for an accounting on shipments handled as these were on junction settlements.

The evidence showed that Respondent allowed quite a number of these shipments to go through to destination on the **through interline waybills** that Petitioner issued at Wickett, Texas (Record page 206). There were about 291 such tank cars in one month as to which Respondent did not change the waybills, but allowed the original waybills to accompany the shipments to Whiting. See Statement in lieu of Debtor's Exhibits 37 (c), 37 (d), 37 (e) and 37 (f) (Record page 501). As to these shipments the Elgin, Joliet and Eastern R. R. was the "waybill destination carrier." Acting under instructions from the Illinois trunk lines the Elgin, Joliet & Eastern cut Petitioner's revenue on these shipments so as to allow the Illinois trunk lines the increased divisions they demanded. Petitioner sued the Elgin, Joliet & Eastern in the Federal Court of the Northern District of Illinois and recovered a substantial amount by compromise before trial. See testimony of Witness Oliver (Record pages 206-7).

If Respondent had let the shipments involved in this suit go through on the original waybills issued at Wickett, Petitioner would have been in a position to have included them in the suit against the Elgin, Joliet & Eastern, and it was solely the act of the Respondent in terminating these waybills at East St. Louis that made it impossible for Petitioner to demand accounting of the Elgin, Joliet & Eastern.

The evidence further shows that in many other instances during this period where petroleum products were handled from points on Petitioner's railroad to points in Illinois, Wisconsin and Indiana moving via East St. Louis on **through waybills**, Petitioner was able to obtain settlement or satisfactory compromise from the waybill destination carrier, in cases where it had paid the Illinois lines a division of 10¢ per cwt. (Record page 146).

III.

Other points mentioned in the Summary of the Argument, supra, including our contention that the decisions of the Arbitration Committees, due to their limited jurisdiction, do not control the decision in this case, and the matter of the importance of the questions here presented have, we think, been fully covered in the petition for the writ.

In conclusion, we wish to stress the fact that this is a very unusual case and that it presents questions that are novel and important and the opinion below is, we think, wholly inadequate. It places a finality on the rulings of these Arbitration Committees that is wholly unwarranted and thereby avoids deciding the real issues in this case. We believe that the case calls for the exercise of the supervisory power of this Court and that writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. SPENCE,
THOMAS BOND,
Attorneys for Petitioner.

THOMPSON, MITCHELL, THOMPSON & YOUNG,
Of Counsel.

January 15, 1947.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 907.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

I.

CORRECTIONS.

Many Statements in Respondent's Brief Require Correction.

A.

Respondent's brief, pages 5 and 16, states that the 10¢ division was only exacted on shipments moving on and after October 19, 1928 on the 32.5¢ rate. This is incorrect.

The Illinois lines exacted 10¢ on all shipments moving after August 15, 1928 on the 37¢ rate, and continued the practice as to the shipments here involved that moved on the 32.5¢ rate. Debtors' Exhibit No. 74 shows these facts (R. 512, 513). By stipulation an agreed statement was printed in the record in lieu of this exhibit which was voluminous and difficult to print. That agreed statement (R. 512, 513) refers to shipments moving in August 1928, **while the 37¢ rate was in effect,** and reads in part, as follows:

> "The exhibit shows that all of these particular cars moved at a time when the through rate on crude oil from Wickett, Texas, to Whiting, Indiana, was 37¢ per cwt., being about three weeks before the reduced rate of 32½¢ per cwt. went into effect.
>
> "The exhibit further discloses that at this time the Illinois Lines were cutting debtor's freight bills handled on junction settlements, from a demand for 30½¢ for service south of East St. Louis to 27¢, allowing only 27¢ for such service and retaining 10¢ for the service north of East St. Louis."

Prior submission of the reduction in the rate to the Illinois lines was not necessary because their revenue was not affected (R. 119, 120, 419). Their participation in the reduced rate duly published as required by the Act to Regulate Commerce constituted concurrence (R. 59, 60).

B.

Respondent states (B. 5) that its division was specifically 9.1¢. It is equally true that petitioner's division was specifically 16.9¢. Respondent had no right to reduce petitioner's revenue because of the action of the Illinois lines and petitioner did not ask respondent to reduce its revenue. We asked it to collect the proper revenue and give each carrier its agreed division. Mr. Oliver so testified (R. 346 Top), to-wit:

> "I contend it was the duty of the Cotton Belt to collect 26¢, retain 9.1 and give the Texas and Pacific 16.9."

The Illinois Trunk Lines were only in a position to enforce their demand for a 10¢ division because of respondent's action in altering the waybills and making junction settlement at East St. Louis. If the shipments had been allowed to go through on the original waybills the E. J. & E. R. R. Co. would have been the settling carrier. Respondent's argument (B. 5) that it might have charged the loss caused by the Illinois Trunk Lines withholding 10¢ in a number of ways, ignores respondent's obligation to collect 26¢ and also ignores the fact that it had no right to reduce the revenue of any prior carrier.

C.

On page 6 of its brief, respondent seeks to limit the application of Rule 118 to shipments moving on through billing. There is no such limitation in the language of the rule. It applies in all cases to "the waybill destination carrier * * * regardless of the final destination of the shipment." Hence the rule applies where the waybill terminates at a junction point just the same as when the waybill terminates at final destination.

D.

Respondent's statement (B. 7) that these junction settlements enabled petitioner to receive its proportion of the revenue earlier than if the waybill had gone through is also incorrect. Rule 106 (R. 196) requires that settlements between carriers be made on or before the 25th of the succeeding month. This rule applied whether petitioner got settlement from respondent following a junction transfer at East St. Louis or from the EJ&E following delivery at Whiting. In either case, petitioner could

not get its money until the 25th of the succeeding month. Respondent, however, by these junction freight settlements got its money at the close of the week's business.

E.

Respondent states (B. 8) that the divisions being in dispute, it had no option under Rule 143 (R. 571) other than to accept the settlement offered by the Illinois lines. Petitioner has always been of the opinion that the action of the Illinois trunk lines was so arbitrary and in violation of the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4, and Sec. 15, Par. 6), as well as of elementary principles of contract law, that it raised no legitimate dispute as to the applicable divisions. Petitioner regards the cutting of respondent's freight bills by the agent of the Illinois trunk lines at East St. Louis as a plain and inexcusable breach of contract. Assuming for argument, however, that divisional dispute existed, respondent's duty to accept the settlement offered was not final but only temporary "pending agreement" (Rule 143, R. 571). The duty still rested upon respondent to obtain correction (Rule 137, R. 570), and to demand judgment (Rule 141, R. 571). We contend that the settlement offered by the Illinois trunk lines being incorrect due to the incorrect changes made in the freight bills by the agent of the Illinois lines at East St. Louis, respondent should have demanded adjustment in accordance with Rule 141 (R. 571) and proceed to obtain correction as per Rule 137 (R. 570), and when correction was refused, respondent should have brought suit. Respondent did none of these things. Therefore, we submit we are justified in our statement that instead of collecting and dividing the proper revenue, respondent acquiesced in the cut and charged part of the loss against petitioner without its consent.

F.

Respondent states (B. 11 and 12) that the issue now raised by petitioner was raised before the arbitration committees (R. 266, 267 and 308). It is true that in its brief before these committees, petitioner put the question quoted at the bottom of page 11 and top of page 12 of respondent's brief as Issue E, to-wit (R. 308):

> "In a case where a carrier makes delivery to a connection at a junction point in junction settlement and renders **an incorrect interline settlement,** because of the fact that the connection has arbitrarily retained excessive revenue, is the carrier making such incorrect interline settlement responsible, under the rules, to carriers up to junction point for correct accounting and correct distribution of revenue or must the carriers up to the junction point proceed against the carrier that has retained excessive revenue?"

It is equally true, however, that the arbitrators refused to decide the above question. Nowhere in the opinions of any of these arbitrators do we find any decision as to whether or not the settlement rendered us by respondent was "an incorrect interline settlement." The arbitrators thought this was a legal question beyond their jurisdiction. Obviously, therefore, their decisions are not conclusive on this issue and the court below should have decided this issue.

G.

The quotation from Arbitrator Streicher's opinion in respondent's brief, page 14, is distorted by parenthetical interpolation. If the court will read the whole paragraph from which this quotation is taken (R. 225) and also Question (e) (R. 224) which Arbitrator Streicher was answering, it will be clear that by the expression "settling carrier" he meant respondent.

II.

THE DECISIONS OF THE ARBITRATION COMMITTTES.

The questions presented herein are as set out on pages 2 and 3 of the Petition and not as formulated on page 2 of respondent's brief. The challenge here is not to the award of the arbitration committees but to the opinion of the Court of Appeals holding that the issues herein were adjudicated by that award, nor is this claim grounded solely on the accounting rules as respondent so often states in its brief. Our right of action arises out of the common law liability of a waybill destination carrier to collect the freight and divide according to agreed divisions and Rule 118 is but declaratory of this common law obligation. (See Point II, page 28 et seq., Petitioner's Brief herein.)

The arbitration in this case was but a preliminary proceeding to obtain an interpretation of the accounting rules (Rules 272, 280, 281, R. 572). The inclusion of this procedure in the mandatory accounting rules is similar to the inclusion of provisions in contracts for the arbitration of disputes over technical matters and which are often held to be conditions precedent to a right of action on the contract or liability. See Palmer v. Fix, 286 Pac. (Cal.) 498, Syllabus 11, l. c. 501, Paragraph 11, where the Court described this type of arbitration as follows:

> "There is, however, an exception to this settled principle of law, that 'where a contract contains a stipulation, **not** that all questions arising thereunder, whether as to the validity or effect of such contract or otherwise, shall be submitted to arbitration, **but** that the decision of arbitrators on a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action on the contract

itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract.' Davisson v. East Whittier Land & Water Co., 153 Cal. 81, 96 P. 88. This rule finds sanction in Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Blodgett Co. v. Bebe Co., supra."

Wabash Railway Co. v. American Refrigerator Transit Co., 7 Fed. 2nd 335, and similar cases cited in the opinion below and in respondent's brief are obviously not in point. Those were so-called common law arbitrations whereby all issues were submitted under an arbitration agreement to arbitrators who were invested with jurisdiction to decide them. The proceeding before these arbitration committees in this case, however, was not such an arbitration, nor was it a proceeding under the Federal Arbitration Act, 9 U. S. C. A., Sec. 2, because not being pursuant to "a written provision" in a contract of the type described in Section 2 of the Federal Arbitration Act "to settle by arbitration" a controversy arising out of such a contract "or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract," these proceedings were obviously not within the terms of the Federal Act.

The proceedings before these arbitration committees were a limited arbitration of the type described in Palmer v. Fix, supra, and we submit that such a limited arbitration binds the parties only as to the particular matters over which the arbitrators are given jurisdiction. It is apparent from Rules 272, 280 and 281, supra, that these arbitration committees were not given any power to decide upon petitioner's legal right to a full accounting from respondent.

III.

RESPONDENT'S DUTY TO COLLECT FROM THE ILLINOIS LINES WAS A PART OF ITS CONTRACT.

Respondent in its brief, page 16, and the Court below in its opinion, state that the divisional contract contained no provision imposing upon appellee the duty to collect from the Illinois lines (R. 598). It is true that no such provision was expressly written into the divisional contract. We submit, however, that the contract fixed the divisions accruing to the several carriers participating in the through rate, and it contemplated that the waybill destination carrier would collect in accordance with the divisional agreement. It is implied in every contract for the division of a through rate that the settling carrier will account to prior lines in accordance with agreed divisions. Such an obligation is implied in every divisional agreement and the accounting rules relied on in this case are but declaratory of that obligation.

Respondent does not deny that under its agreement with petitioner, petitioner was entitled to a division of 16.9¢ out of the portion of the through rate lawfully accruing to East St. Louis, at which point respondent terminated the waybills and made settlement with the Illinois lines. Respondent does not deny that petitioner has lost a substantial portion of that revenue. It contends, however, as it has in previous stages of this case, that petitioner's right of action is against the Elgin, Joliet & Eastern Railway Company. We anticipated this argument and answered it under Point II, page 18 et seq. of the Petition herein, and also under Point II, page 28 et seq. of Petitioner's Brief herein, to which we again make reference. The fallacy in respondent's whole argument on this point lies in the fact that respondent fails to distinguish between shipments handled to destination under through waybills,

and shipments handled to a junction point short of final destination under waybills that terminate at such junction point. As to the latter, the inbound carrier at the junction collects the freight up to the junction and **settles** with prior lines. Lines prior to the junction point receive no accounting and have no right of action against the carrier at final destination. The initial carrier and the carrier at final destination are parties to separate transportation movements and there is no privity between them, and such was the practice followed in this case. Petitioner received no accounting from the destination carrier, the Elgin, Joliet & Eastern Railway Company. The only accounting petitioner received was from respondent and the very fact that respondent rendered us an accounting establishes that respondent recognized that it was to it that we had a right to look for collection and account.

We tried to point out in the Petition and supporting Brief that the questions in this case are important, that questions of local law have been decided below in a manner that is untenable and probably in conflict with the state law as yet unannounced by the Missouri courts. Also that the case presents an important question of Federal law concerning divisions of through rates established in accordance with the Act to Regulate Commerce, that ought to be settled by this court. Nowhere in respondent's brief does it seriously question the importance of the questions here presented for review, and we respectfully submit that this case calls for the exercise of the supervisory power of this Court, and that certiorari should be granted.

Respectfully submitted,

CHARLES M. SPENCE,
THOMAS BOND,
Attorneys for Petitioner.

THOMPSON, MITCHELL, THOMPSON & YOUNG,
Of Counsel.

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.
No. 907.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

A. H. KISKADDON,
OLIVER J. MILLER,
JACOB M. LASHLY,
Attorneys for Respondent.

LASHLY, LASHLY, MILLER & CLIFFORD,
Of Counsel.

February 7, 1947.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Petitioner, vs. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor, Respondent.	No. 907.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri dismissing the claim of petitioner are unreported, and are found at page 575 of the Record herein. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree below is also unreported as yet, and is found at page 589 of the Record.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 27, 1946 (Record page 589). Petition for rehearing was filed on December 9, 1946 (Record pages 601-607), and denied on December 16, 1946 (Record page 609). The petition for writ of certiorari was filed on January 17, 1947, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347.

QUESTIONS PRESENTED.

The only question presented here is whether respondent, an intermediate carrier, is liable to petitioner, the initial carrier, for certain proportions of a joint freight charge claimed by petitioner for the transportation of crude petroleum over a through route from Wickett, Texas, to Whiting, Indiana. Petitioner's claim, which is grounded on the alleged violation by respondent of certain Mandatory Freight Accounting Rules, formulated by the Railroad Accounting Officers Association, was denied by the Interline Freight Accounting Arbitration Committee and by the Interline Freight Accounting Arbitration Appeal Committee. Petitioner challenges the award of the arbitrators, which both the district and the appellate courts hold to be conclusive of the issues and binding upon the parties.

All other questions formulated at pages 2 and 3 of the petition are either merely academic and speculative, or are otherwise wholly irrelevant to the case and to the issues decided by the courts below.

STATEMENT.

In the latter part of November, 1927, an oil field was developed near Wickett, Ward County, Texas, a station served by the Texas and Pacific Railway Company, hereinafter also referred to as petitioner. The crude oil was to be refined in Whiting, Indiana, and petitioner was, therefore, anxious to establish a through rate from Wickett to Whiting, with the concurrence of all the connecting railway lines (Record page 46 and Debtor's Exhibit 3, Record pages 416-417). Petitioner is the initial carrier and operates a line of railroad from Wickett to Big Sandy, Texas. The connecting carriers are: respondent and its Texas subsidiary, which operate lines of railroad from Big Sandy to St. Louis, Missouri, and East St. Louis, Illinois; and the Alton Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Illinois Central Railroad Company, the Wabash Railroad Company, hereinafter called "the Illinois trunk lines", which operate lines of railroad from East St. Louis to Chicago junctions. The terminating carrier is the Elgin, Joliet & Eastern Railroad Company, which delivers the oil to the consignee, the Standard Oil Company, at Whiting, Indiana, and collects from it the freight charges (Stipulation of Facts, Record pages 31-32; 173).

The through rate was established at 37¢ per 100 pounds of crude oil, and was published in the Southwestern Lines' Tariff 125-C, Suppl. No. 3, issued on November 17, 1927, and effective on November 24, 1927 (Claimant's Exhibit 1, Record page 49). Respondent's Joint Division Sheet No. 9828, also effective on November 24, 1927, allowed 6.5¢ of the through rate of 37¢ to the lines north of East St. Louis, and the balance to the lines south of East St. Louis (Claimant's Exhibit 15, Record page 87). The division of

the balance of 30.5¢ was established at 21.35¢, or 70%, to petitioner, and 9.15¢, or 30%, to respondent and its Texas subsidiary, in spite of the disproportion of this division to the mileage haul (for a discussion of this disproportion, see Record page 277). No question arises concerning the aforesaid divisions under the 37¢ rate.

In March, 1928, petitioner began negotiations with respondent for the reduction of the rate to 32.5¢ (Claimant's Exhibit 18, Record page 96). Respondent consented to the publication of a through rate of 32.5¢ on condition that it would continue to receive for itself and its subsidiary the same division as before, namely, 9.1¢ (Claimant's Exhibit 19, Record page 96; Claimant's Exhibit 20, Record page 97; Stipulation of Facts, Record page 35—bottom), thus leaving 16.9¢ for petitioner. **The reduction of the rate was not submitted for concurrence to the Illinois lines,** whose 6.5¢ division was not affected thereby (Debtor's Exhibit 12-A, Record page 419; Debtor's Exhibit 12-B, Record page 420).

The new through rate of 32.5¢ from Wickett, Texas, to Whiting, Indiana, was published in respondent's Tariff No. 125-C, Suppl. No. 25, issued on August 9, 1928, and effective September 18, 1928 (Stipulation, Record page 36; Claimant's Exhibit 5, Record page 57).

Prior to September 18, 1928, on which date the 32.5¢ rate was to come into effect, the railway lines operating north of East St. Louis decided to raise their division from 6.5¢ to 10¢, effective August 15, 1928. Notice of this change was given by the Illinois trunk lines on August 8, 1928 (Claimant's Exhibit 26, Record page 120), and they refused to recede from their position "despite the vigorous protests of interested connecting carriers, including appellant [petitioner] and appellee [respondent]" (Opinion Court of Appeals, Record pages 591-592; Record pages

393-396; Debtor's Exhibit 21, Record page 426), which protests were also made to the Interstate Commerce Commission (Claimant's Exhibit 26-B, Record page 126; Claimant's Exhibit 26-A, Record page 125).

Since the Elgin, Joliet & Eastern, as terminating carrier, collected the freight charges on all of the petroleum, the Illinois trunk lines were able to enforce their demand for 10¢ by withholding that amount in settlements with prior carriers. Neither respondent nor petitioner ever received the division of the reduced rate which they insisted lawfully accrued to them.

The first oil movement from Wickett to Whiting involved in this suit, as to which the Illinois lines retained a division of 10¢, took place on October 19, 1928. Respondent had then the alternative either to charge the loss of revenue entirely upon petitioner or to apportion said loss between itself and petitioner.

Respondent's agreement with petitioner allowed it **an arbitrary** of 9.1¢ and not a percentage. Standing on the literal terms of said agreement, respondent could have retained its 9.1¢ and remitted the balance, namely 13.4¢ to petitioner (Record page 485, top). This is admitted by petitioner's accountant and witness Oliver (Record page 344, top). Instead of taking this position and in order to help petitioner, respondent converted the division of 9.1¢ to respondent and of 16.9¢ to petitioner, into percentages, resulting in 35% or 7.875¢ to respondent, and 65%, or 14.625¢, to petitioner (Stipulation, Record page 38). The difference between 14.625 per cwt. which petitioner received for the period in question and what it would have received had it been paid 16.9¢, amounts to $64,424.46, and is the amount which petitioner seeks to recover from respondent (Stipulation, Record page 38, bottom).

It should be noted that the shipments in question moved on what is known as "junction settlement", **which is a procedure for the collection of freight, and is authorized as an alternative method to "through billing"** by the Mandatory Freight Accounting Rules adopted and agreed to by the major railroads of the United States, including petitioner and respondent (Stipulation, Record page 32, No. 3 and page 37, bottom; Opinion Court of Appeals, Record page 593, bottom; page 594). In through billing, a through interline waybill, issued by the original carrier accompanies each shipment from origin to destination. This through waybill shows, among other things, the origin and destination of the shipment, consignor and consignee, route of movement, the applicable rate and and the information necessary to the apportionment of revenue between connecting carriers. As it is provided for by Mandatory Rule 118 (Record page 570), on shipments moving on **through billing**, freight charges collect, the destination carrier collects the charges from the consignee and accounts to prior carriers for their established divisions of the applicable rate (Stipulation, No. 3, Record pages 32-33; Opinion Court of Appeals, Record page 593).

On the **junction settlement** plan, which is the procedure involved in the present suit,* when the shipments of petitioner arrived at East St. Louis, respondent changed the headings of their waybills, which read "to Whiting, Indiana," to read "to East St. Louis, Illinois", and the headings reading "Consignee: Standard Oil Company of Indiana" to read "Consignee: Standard Oil Company of Indiana, Whiting, Indiana" (Stipulation, No. 5, Record pages 37-38). Thereafter, the Illinois trunk lines issued new waybills for the transportation from East St. Louis to Whiting.

* This suit concerns merely oil shipments moving on "junction settlement," and covers the period October 19, 1928, until December 27, 1929, when "through billing" was established (Stipulation, Record page 38; Record page 482).

This method permitted cash settlements to be made with the Illinois lines at the close of each week's business and enabled respondent and petitioner to receive their proportion of the revenue thirty days sooner than under through billing.

Respondent had been operating under the "junction settlement" plan since March 1, 1920, when it came out of federal control after the first World War, without capital or government guarantee (Record page 482). Petitioner, which was perfectly aware of this practice when it negotiated for and routed these shipments over respondent's line and accepted this procedure at the time upon respondent's avowed intention to maintain same (Debtor's Exhibit 34, Record page 494; Debtor's Exhibit 35-A, Record page 495; Debtor's Exhibit 36-A, Record page 497), is not justified now in charging that respondent "failed to follow the shipping instructions" of petitioner (Petition, page 5), as if by so doing respondent were committing wrong or failing to live up to contractual obligations.

Cash settlements between respondent and the Illinois trunk lines at East St. Louis were accomplished in the following manner as provided by the Mandatory Rules, 135 ff. (Record pages 570-572). Respondent on delivering a shipment to an Illinois trunk line presented that carrier with a bill for that part of the joint rate chargeable to the transportation from Wickett to East St. Louis. The Illinois line receiving the shipment advanced to respondent the charges accruing on the transportation from Wickett to East St. Louis, and respondent remitted to petitioner its division of the revenue (Record, page 405). Elgin, Joliet & Eastern collected from consignee at destination the full freight charge for the movement on the through rate from Wickett to Whiting (Record, page 173).

When the Illinois trunk lines started deducting 10 cents on junction settlements, this created a disputed division (Record page 486), and Freight Accounting Rule 143 (Record page 571) became applicable. This rule provides as follows:

> "The outbound carrier [Illinois lines] shall prepare junction Settlement Sheets * * *. In case of disputed divisions, the settlements made by the outbound carrier [Illinois lines] must be accepted by the inbound carrier [respondent] pending agreement by traffic departments of interested carriers" (Record pages 485-6).

This left no alternative to respondent, and shows the inaccuracy of petitioner's statement that respondent "acquiesced in the cut" (Petition, page 6).

Following the Procedure in Disagreements set forth in the Mandatory Rules 272 ff. (Record pages 572-574), petitioner instituted arbitration proceedings against respondent, alleging that respondent was liable to petitioner for violation of the Mandatory Rules. Both the Interline Freight Arbitration Committee and the Interline Freight Arbitration Appeal Committee found the issues in favor of respondent, held that it had not violated any of the Mandatory Interline Freight Accounting Rules and that petitioner had no cause of action against respondent (Record pages 265, 269, 273; on appeal, Record pages 226, 230, 233).

The findings of the arbitration committees were upheld both by the District (Record page 577) and by the Appellate Courts, which held that the award was final and binding upon the parties (Record pages 597-600).

ARGUMENT.

I. There Is no Conflict of Decisions Among the Circuits and the Decision Below Is Fully Supported by the Record.

1. This case involves no complicated issue. Petitioner charges that respondent is liable to it for the alleged violation of certain Mandatory Rules. This issue has been submitted by petitioner to two Freight Interline Arbitration Committees, which held that no mandatory rule had been violated by respondent, and that petitioner had no cause of action against respondent under the Rules. The award has been upheld by two federal courts, and petitioner now seeks certiorari to review their decisions, alleging the great importance of the questions involved here. Petitioner claims that "these questions are novel" (Petition page 12) and therefore is not alleging any conflict of decisions among circuit courts, but relies on the importance of the case as the ground for the granting of certiorari by this Court. Petitioner cites the case of **Mackay Radio and Telegraph Co. v. Radio Corp.** (1939), 306 U. S. 86, l. c. 89, as a case in which this Court granted certiorari solely "because of the nature and importance of the case" (Petition, page 13). Petitioner's quotation is not complete. This Court actually stated:

> "We granted certiorari, 305 U. S. 582, ante, 367, 59 S. Ct. 73, because of the nature and importance of the case, on a petition which urged as grounds for its allowance that validity and infringement of the Carter patent were in doubt and that, as petitioner is the only competitor of respondent in the business of world wide public radio communication, **further litigation, resulting in conflict of decision among circuits, was improbable.**" (Our emphasis.)

In the present case no contention is made or could be made by petitioner that conflict of decisions among circuits may not arise in the future. The Mandatory Rules are accepted and followed by the major railroads of the United States, and cases concerning the Rules may arise in any circuit of the United States.

2. Petitioner alleges that "the Court of Appeals has wholly misconceived the effect of the decisions of these Arbitration Committees" (Petition, page 13). The contrary is true. Petitioner argues that Rule 118 (Record page 570) requires the destination carrier to account for the proper revenue, and that by using the "junction settlement" respondent "made itself the collecting carrier of that portion of the joint rate accruing up to East St. Louis [and] therefore under the express terms of the Rule * * * it is 'responsible for the collection of the proper revenue, and for the proper reporting to all roads interested,' " irrespective of whether or not respondent collected such revenue (Petition, pages 29, 7, 12 and 19).

Petitioner made, unsuccessfully, the same contention before the Arbitrators as it is shown by the following passage of its brief before the Arbitration Committee:

> "R. A. O. A. Mandatory Rules 79 and 73 provide that statements of differences 'if correct shall be promptly embodied in a correction account by settling carrier'. The St. Louis and Southwestern Railway by its action in suppressing through billing became the 'settling carrier' and as such responsible under the rules for the adjustment of Texas and Pacific Railway statements of differences" (Record page 324, § 20).

Petitioner's present position is that the arbitrators did not absolve respondent from liability under the Mandatory Rules and that "they did not decide, as inadvertently

stated in the opinion below, that 'neither Rule 118 or 79 had any application on the question before them * * * and this without regard to ultimate decision of that dispute by the courts and by the Commission' (Record page 599)" (Petition, page 9).

The record shows beyond any shadow of a doubt that the contrary is true.

With specific reference to Rule 79, Arbitrator B. F. Russell said:

> "It is my opinion that there has been no violation of Mandatory Rule 79, 1928 Procedure, and Mandatory Rule 73, 1929 and subsequent Procedures" (Record pages 263-264).

Similarly, Appeal Arbitrator K. W. Price stated:

> "Question (2) * * * is its [respondent's] refusal to issue correction account covering the statements of differences attached a violation of Mandatory Rule 79 (1928-1929)?
>
> "Answer. No" (Record page 232).

Petitioner contends that the arbitrator's award

> "left open the further question of whether or not it was respondent's duty under established accounting rules and practices to collect this illegal exaction from the Illinois lines, and account to prior lines in accordance with their agreed divisions" (Petition, pages 13-14).

The record shows that such issue was discussed and decided by the arbitrators in the very language in which petitioner submitted it to them, as issue (e), namely:

> "In a case where a carrier makes delivery to a connection at a junction point in junction settlement and renders an incorrect interline settlement, because of the fact that the connection has arbitrarily retained excessive revenue, is the carrier making such incorrect

interline settlement responsible, under the rules, to carriers up to junction point for correct accounting and correct distribution of revenue, or must the carriers up to the junction point proceed against the carrier that has retained excessive revenue?" (Record pages 266 (e), 271 (e); on appeal: pages 224, 227-8.)

This is the same issue which was presented by petitioner's claim in the District Court (Record pages 7, bottom, and 8) and which is repeated here.

The arbitrators unanimously held that respondent was not liable to petitioner on such or any other of the issues presented, and that it had not violated any of the applicable Mandatory Rules.

Arbitrator B. F. Russell said:

> "It is my decision that there was no violation of mandatory interline freight accounting rules, and that the Texas and Pacific have no cause of action and must assume the arbitration fee of $15.00 in accordance with Rule 282, Jan. 1, 1936 Procedure" (Record page 265).

Arbitrator F. J. Tague, upon whose decision petitioner attempts to rely (see petition, page 9) actually concluded his decision with the following words:

> "It is my opinion that a violation of the Mandatory Interline Freight Accounting Rules has not been made out and that the Texas and Pacific Railway Company has no cause of action and must assume the arbitration fee * * *" (Record page 269).

Arbitrator E. N. Larson said:

> "Rule 139 of the 1929 procedure [same as Rule 143 of the 1928 procedure, Record page 571] provides that in case of disputed divisions, the original settlement made by the outbound carrier must be accepted, pending agreement by traffic departments. * * * In

> my opinion this controversy appears to be a question of disputed divisions between traffic departments, and the Texas and Pacific Railway Company is without cause of action and should assume the arbitration fee * * *" (Record page 273).

On appeal the same results were reached by the Appeal Arbitrators. Thus, H. V. Clemens, Appeal Arbitrator, said:

> "It is the decision of this Appeal Arbitrator that the Texas & Pacific Ry. Co. has no cause of action against the St. Louis Southwestern Ry. Co. under the mandatory rules of this association and the Texas & Pacific Ry. Co. should therefore assume the arbitration and appeal fees * * *" (Record page 230).

Similarly, K. W. Price, Appeal Arbitrator, concluded that petitioner

> "has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association" (Record page 233).

Appeal Arbitrator, G. W. Streicher, stated:

> "I concur in the decision reached by Arbitrators Price and Clemens that the Texas and Pacific Ry Co. has no cause of action and should assume the arbitration and appeal fees * * *" (Record page 226).

Petitioner does not claim that the arbitrators were wrong, and that their award should have been set aside or corrected by the courts. Petitioner merely says that the courts "wholly misconceived the effect of the decisions of these Arbitration Committees" (Petition, page 13). *The record reviewed above shows unmistakably that the six arbitrators, all railroad experts, found that respondent had not violated any one of the applicable Mandatory Rules.*

The findings of the District Court (Conclusion No. 3, Record page 577), and of the Circuit Court of Appeals

(Record pages 597-600) are irrefutably justified by the record.

3. Petitioner states that

> "The Arbitration Committee in this case did not by interpretation limit in any way the obligations placed on the waybill destination carrier by Rule 118 to collect the proper revenue."

This is true, but not in the sense intended by petitioner. The arbitrators did not limit, nor could they have limited, the liability of the Elgin, Joliet and Eastern Railroad Company as the terminating carrier under Rule 118, the common law and statutory law, for the collection of the freight and the apportionment of the proper revenue between the participating carriers. The Elgin, Joliet and Eastern Railroad Company collected the money which petitioner seeks, and, according to petitioner's contention, is illegally withheld. If so, there is nothing that prevents petitioner from asserting its claim against the Elgin, Joliet and Eastern Railroad Company.

This point was clearly made by Appeal Arbitrator Streicher, who stated:

> "The responsibility rests with the settling carrier [the Elgin, Joliet & Eastern R. Co.] to render a correct settlement to other interested lines, and this responsibility is not relieved because of the suppression of a through waybill at an intermediate point. This point is clearly established under provisions of Mandatory Rules Nos. 62 to 79, inclusive (1929 edition), and corresponding preceding and superceding rules" (Record page 225).

The same point was made by the Circuit Court of Appeals, which said:

> "If we concede for the argument that appellant is correct in its contention that the lawful rate on crude

> petroleum from Wickett to Whiting was 32.5 cents, in which the Illinois Trunk Lines were bound by contract with appellant and appellee to participate for a division of 6.5 cents, a question which we do not decide, it would seem that appellant's remedy was an action against the Elgin, Joliet & Eastern, the carrier which collected all freight charges, for the recovery of the lawful division of the established rate" (Record page 592).

Nor did the arbitrators express any opinion as to the action of the Illinois lines which were not even parties to the arbitration proceedings, in withholding a larger proportion of the revenue than originally agreed upon.

In the arbitration proceedings petitioner made the following contention:

> "The fact that Illinois Freight Association carriers arbitrarily retained revenue based upon the forcible imposition of an illegal division in no way mitigates in favor of the St. Louis and Southwestern Railway in its violation of the rules. The Texas and Pacific Railway can properly look only to the St. Louis and Southwestern Railway for redress under the mandatory rules. The St. Louis and Southwestern Railway has had ample opportunity to contest the illegal action of the Illinois lines and if it has failed to do so the disability is of its own creation [sic]. The St. Louis and Southwestern alone is answerable for the infraction of the rules here involved" (Record page 324).

As referred to above, the six arbitrators unanimously held that respondent had not violated any of the applicable Mandatory Rules, and that, under the Rules, respondent is not liable to petitioner for the action of the Illinois lines, upon which action the arbitrators refused to pass.

In its petition, Texas & Pacific quotes part of the decision of Arbitrator Price:

> "• • • I agree with the unanimous decision of the arbitrators, and it is the decision of this appeal arbitrator that while the Texas & Pacific Railway Company may have had the right to present the case to the Interstate Commerce Commission, or may have legal rights in court, it has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association. The Texas & Pacific Railway Company should, therefore, assume the arbitration and appeal fees in accordance with the requirements of Mandatory Rule 300, effective January 1, 1936" (Petition page 14).

The suggestion of the arbitrators that petitioner may have some rights which it may assert before the Interstate Commerce Commission or the courts does not even imply that such rights, if any, should be asserted against respondent, and said rights seem rather to be those which petitioner may assert against the Illinois lines which withheld the revenue claimed by petitioner, or the Elgin, Joliet & Eastern Railroad Company, the terminating carrier which collected the freight.

Similarly, the district court expressly declined to rule on the legality of the action of the Illinois trunk lines in exacting increased divisions of the 32.5 cent rate (Conclusion of Law No. 4, Record page 577). The Circuit Court of Appeals affirmed that decision and held that, irrespective of whether or not the division of the 32.5 cent rate in the proportions of 6.5 cents to the Illinois lines and 26 cents to petitioner and respondent, was a contract valid and binding upon the Illinois lines, **such contract neither expressly nor impliedly made respondent liable to petitioner for revenue not collected from the Illinois lines** (Record pages 597-598).

This point is not answered by petitioner, which discusses in detail why the Illinois lines had no right to retain a

larger revenue (Brief, pages 24-28), but fails to show why respondent herein should be liable for such action of the Illinois lines, except for respondent's alleged liability as a result of a claimed violation of the Mandatory Rules—in the face and in spite of the arbitrators' decision that no Mandatory Rule has been breached by respondent.

Specifically, Appeal Arbitrator G. W. Streicher pointed out in his decision that

> "The division sheet called for distribution of a specified sum of money and since the amount of revenue received was not sufficient for distribution strictly in accordance with the division sheet, it must follow that division sheet was not applicable and the settlement made by the StLSW Ry. Co. under Mandatory Rule 101 constituted a correct settlement. The StLSW Ry. Co. cannot be held in violation of Rule 73 (1929 edition) by its refusal to accept and account for statements of difference based on inapplicable divisions" (Record page 226).

The conclusion seems warranted that the authorities quoted by petitioner as supporting the proposition that "where the arbitrators refuse to consider a claim because they deem it not to be within their jurisdiction under the submission, such claim may properly be made the basis of an action" (Petition page 17), may be applicable to sustain an action against the Elgin, Joliet & Eastern Railroad Company or the Illinois lines, **but not against respondent,** which the arbitrators found not to be liable under any of the applicable Mandatory Rules.

II. The Decision Below, Which Held the Arbitrators' Award to Be Valid and Binding Upon the Parties, Is in Accord With the Weight of the Authorities and Petitioner Failed to Show How Said Decision Is Untenable and Probably in Conflict With the State Law as Yet Unannounced by the Supreme Court of Missouri.

Petitioner claims that the "trial Court's conclusion of law No. 3 (Record page 577) to the effect that the award of the Arbitration Committee adjudicated petitioner's rights under the rules is untenable, and the decision of the Court of Appeals affirming that ruling is likewise untenable" (Petition, pages 17-18). This contention amounts to a challenge of the binding character of the award of the arbitrators, which award petitioner sought in the first place.

The Circuit Court of Appeals held that

> "Whether the arbitration committees were right or wrong in their interpretation and application of the Mandatory Freight Accounting Rules is no concern of the courts. The controlling issue in the case having been submitted to arbitration and decided, the decision of the arbitrators is binding on the courts. **Wabash Railway Co. v. American Refrigerator Transit Co.**, 8 Cir. 7 F. 2d 335, 351; **McCullough et al. v. Clinch-Mitchell Construction Co.**, 8 Cir., 71 F. 2d 17, 22; **Richardson & Sons, Ltd. v. Hedger Transportation Corp.**, 2 Cir., 98 F. 2d 55, 57" (Record pages 599-600).

It is submitted that the above authorities are in point here, that they represent the applicable law, and that they fully support the holding of the appellate court.

In the **Wabash** case, cited above, cert. den. 270 U. S. 643, 70 L. Ed. 776, the Circuit Court for the Eighth Circuit said, loc. cit. page 351:

"Arbitration is favored by the courts. It is a mode of settling disputes less expensive and more expeditious than court procedure. In these days of long drawn out litigation and ever-increasing expense of trial, it may well become a special favorite of the law. Here were serious questions productive of litigation. The parties entered into an agreement that they should be considered and determined by an eminent and learned lawyer. He did so, and rendered his decision. The submission of the matter carried with it an implied agreement to be bound thereby. There is no claim made that the decision of the arbitrator was the result of fraud, partiality, misfeasance, or palpable mistake, resulting in an injustice to either party or that the arbitrator went beyond the scope of the questions submitted. If the statements of fact of the amended bill are to prevail, we see no reason why the parties to the arbitration are not bound as to the questions submitted to and determined by the arbitrator, and precluded from again agitating them. 2 Ruling Case Law, § 32, p. 386; Barnard v. Lancashire Ins. Co., 101 F. 36, 41 C. C. A. 170; Burchell v. Marsh et al., 17 How. 344, 15 L. Ed. 96; City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; Toledo S. S. Co. v. Zenith Transp. Co., 184 F. 391, 106 C. C. A. 501; McNees v. Ins. Co., 69 Mo. App. 232; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055; Morse on Arbitration and Award, p. 293. See also, extended note to Williams et al. v. Branning Manufacturing Co., 47 L. R. A. (N. S.) 337, where a mass of authorities is collected on the general subject.

"Every reasonable intendment is indulged in favor of such an award. Reedy v. Scott, 90 U. S. 352, 23 L. Ed. 109; Grant v. National Bank of Auburn (D. C.), 232 F. 201; Aetna Ins. Co. v. Hefferlin, 260 F. 695, 171 C. C. A. 433. **Such arbitrations are recognized by the laws of Missouri, the state where the agreement to arbitrate was made.** Ellison v. Weathers, 78 Mo. 115; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323." (Emphasis ours.)

In the **McCullough** case, cited above cert. den. 293 U. S. 582, 79 L. Ed. 678, the same court said, loc. cit. page 22:

> "Where an award has been made and the matter is how to make it effective, the law in the federal courts is as follows: Where there is national or state legislation providing for legal enforcement of an award, that will be done on the principle that such governs the remedy to enforce a recognized right. Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. Where there is no such statute, the award will be given effect 'in any appropriate proceeding at law, or in equity.' Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 121, 44 S. Ct. 274, 276, 68 L. Ed. 582, and see Bayne v. Morris, 1 Will. 97, 17 L. Ed. 495; Burchell v. Marsh, 17 How. 344, 15 L. Ed. 96; Karthans v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; Davy v. Faro, 7 Crouch 171, 3 L. Ed. 305."

In the **Richardson** case, cited above, the Circuit Court of Appeals for the Second Circuit held as follows, loc. cit. page 57:

> "This Court is without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators. The Hartbridge, 2 Cir., 62 Fed. 72. Their award is final and binding. Columbia v. Canca Co., 190 U. S. 524, 23 S. Ct. 704, 47 L. Ed. 1159; New York and Cumberland Ry. Co. v. Myers, 18 How. 246, 59 U. S. 246, 15 L. Ed. 380; Burchell v. Marsh, 17 How. 344, 58 U. S. 344, 15 L. Ed. 96; Georgia and F. R. Co. v. Brotherhood of Locomotive Engineers, 5 Cir., 217 F. 755; In re Wilkins, 169 N. Y. 494, 62 N. E. 575. There is no claim here of fraud, corruption or misconduct affecting the award."

Similarly, the Circuit Court of Appeals for the District of Columbia in **Campbell v. Campbell**, 44 App. D. C. 142 (1916), cert. den. 242 U. S. 642, 61 L. Ed. 542, stated that:

> "An award * * * valid on its face * * * until set aside in a proper proceeding * * * has the force of a judgment, and therefore **became res adjudicata as to all matters embraced in the submission * * * between the parties.**" (Emphasis ours.)

See, also, the Circuit Court of Appeals for the First Circuit in **Mutual Benefit Health & Acc. Ass'n v. United Cas. Co.** (1944), 142 F. (2d) 390, 393, cert. den. 323 U. S. 721.

The question is not a novel one for this Court.

In **Columbia v. Canca Co. et al.** (1903), 190 U. S. 524, 530, 47 L. Ed. 1159, 1164, Justice Holmes, speaking for this Court said:

> "It is for us to determine the scope of the Commission [of arbitration], whatever may have been its own finding with regard to its powers. But when its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down."

Reference should also be made to the Federal Arbitration Act of 1925, 9 U. S. C. A. 11, which reads as follows:

> "In either of the following cases the United States Court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. Feb. 12, 1925, c. 213, § 11, 43 Stat. 885."

It should be noted in this connection that petitioner does not even attempt to claim that its contention is within the permissible scope of the review authorized by the statute.

The same law is affirmed in the various jurisdictions of the Union. See the Supreme Court of Oregon in **Jacob v. Pacific Export Lumber Co.** (1931), 136 Or. 622, 297 P. 848, 856:

"Every matter which was decided or could have been presented to the arbitrator and decided in an award comes within the rule of res judicata. Hooper v. Pennick (102 Or. 382, 202 P. 743); First Nat. Bank v. Buckland, 130 Or. 364, 280 P. 331, 332."

The **Jacob** case was quoted with approval by the Supreme Court of Utah in **Grannopulos v. Pappas** (1932), 80 Utah 442, 15 P. (2d) 353, 356.

See also, in accord, the Supreme Court of Oklahoma in **Inglis v. Trickey et al.** (1935), 172 Okl. 144, 45 P. (2d) 135, 137, and authorities cited there.

Petitioner states "We submit that the opinion below creates uncertainty and confusion" (Petition, page 18). In view of the authorities quoted above, and of the binding character which should be conceded to the award, "uncertainty and confusion" would have arisen should the court below have set aside or disregarded the award of the Interline Freight Accounting Committees.

Petitioner alleges as a ground for the granting of certiorari that

> "The questions of local law involved in this case are important, and the Circuit Court of Appeals has decided them in a way that is untenable and therefore probably in conflict with the State law as yet unannounced by the Supreme Court of Missouri.
>
> • • • • • • •
>
> "* * * the Circuit Court of Appeals has decided the question of petitioner's legal right to hold respondent responsible for the collection and accounting to it of its agreed division out of the joint rate, and the question of the scope and effect of the decisions of the Arbitration Committees, in a way that is untenable, and in conflict with agreed upon accounting rules and practices, and in conflict with the weight of authority. It cannot be assumed that the Missouri Courts would so erroneously rule, and we say therefore as did this court in Ruhlin v. New York Life Insurance Company (Supra, l. c. 206), 'the decision below was "probably untenable" and therefore probably in conflict with the State law as yet unannounced by the highest court of the State' and certiorari should be granted." (Petition page 20.)

To complete the quotation of this court's decision in the **Ruhlin case**, 304 U. S. 202, the following passage should be added:

> "No such showing [of conflict with local law] was attempted by the petition" (Loc. cit. page 206).

It is submitted that **no such showing is made by Texas & Pacific** in its petition. As the index of the petition readily shows, not a single Missouri case, statute, textbook or law review article is cited by petitioner in support of its contention.

On the contrary, Missouri courts have decided cases involving arbitration awards, and have held that the arbi-

trators' decisions are final and binding upon the parties, except for cases of fraud and similar matters which are not involved in the present case.

In **Higgins-Wall-Dyer Co. v. City of St. Louis** (1932), 331 Mo. 454, 53 S. W. (2d) 864, 866, the Supreme Court of Missouri stated as follows:

> "'Neither by the contract of submission to arbitration nor by the statutes is the Court given power to review an award for errors of law. Unless there is some reservation in the contract submitting a controversy to arbitration the arbitrators are to pass upon the whole controversy, including the law and the facts and their decision as to each is final, binding and conclusive.'"

See also **Pope Const. Co. v. State Highway Commission** (1935), 337 Mo. 30, 84 S. W. (2d) 920, 921, in which the Supreme Court of Missouri, referring to an arbitration proceeding brought under the Missouri statutory provisions, said:

> "From a reading of the foregoing sections of the statute, it seems plain that the court is not authorized to examine or review the evidence or determine whether under the evidence the award is correct and that it cannot go into or adjudicate the merits of the controversy."

In **Dickens v. Luke** (1928), 2 S. W. (2d) 161, 162, the Springfield Court of Appeals said:

> "Plaintiff went into the arbitration with his eyes open and has received the fruits of the award. No fraud or partiality is shown, and we find no ground which would justify overturning the trial court's finding that plaintiff is precluded."

See also **Williams v. Chicago, S. F. & L. Ry. Co.** (1892), 112 Mo. 463, 20 S. W. 631, 637.

From the foregoing the conclusion seems warranted that the decision of the Circuit Court of Appeals is in accord with the weight of authority as well as with local law.

III. **No Important Question of Federal Law Is in Issue.**

Petitioner contends that

> "Questions 3 and 4 stated supra under the heading 'Questions Presented' involve an important question of Federal law as to whether or not under the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4 and Sec. 15, Par. 6), the Illinois Lines could legally establish a division of 10¢ per cwt. by the method they pursued in this case. Under point 1 of the argument in the supporting brief, we state the argument against the right to so establish a division of a joint rate. The opinion below refused to decide this question (R. 597, 598).
>
> "The exact question here presented has not been decided by this court. It involves an interpretation of the above sections and paragraphs of the Act to Regulate Commerce which is, of course, a Federal question. The correct decision of this question is a matter of great importance to all railroads whose rates and divisions are subject to Federal regulation and we submit certiorari should be granted" (Petition page 21).

The question is merely academic and it is not therefore properly before this Court. The Arbitrators, the District Court and the Circuit Court of Appeals have all unanimously held that the issue of the legality of the action of the Illinois lines in withholding a greater proportion of the revenue was not relevant and material to the decision of the present case, and that no liability could be fastened on respondent for the said action of the Illinois lines. The point has already been discussed in this brief, supra, and the fact that the Circuit Court of Appeals held the issue

immaterial (Record pages 598-599) does not seem to call for the exercise of the extraordinary remedial powers of certiorari which are invoked on the theory that the Circuit Court has "decided an important question of Federal law which has not been, but should be, settled by this Court" [Supreme Court Rule 38 (5) (b)].

Petitioner does not contend that under the common law or statutes, **it was the duty** of the respondent to sue the E. J. & E. It could not support that by any decisions, and it appears obviously untenable that one intermediate carrier should be obliged to sue for a proportion of the through rate of another carrier, from a terminal carrier, when the originating carrier has a well established legal right, both under the statutes and at common law, to sue and collect from such **terminating carrier who alone has collected its money and who alone holds it.** And this is true regardless of "junction settlements" which might have been used by the intermediate carriers. This is what equity would demand.

In the case of **Atlantic Coast Line v. B. & O. R. R.** (1935), 12 F. Supp. 711, the United States Court for the Seventh District said that it made no difference in the right to sue that the terminating carrier already paid a part of the rate to a connecting carrier. The Court said:

> "the defendant [terminating carrier] has not paid to the plaintiff [originating carrier] the fair division to which it is entitled. And this is true whether the defendant in fact has overpaid the R. F. & P. [intermediate carrier] or not. Even if it has, that would be no justification for withholding from plaintiff the amount to which it is fairly entitled. The plaintiff at no time assented to the division which was made by the defendant on its own initiative and responsibility. * * * For that reason the motion to dismiss the bill must be overruled" (l. c. p. 720).

In other words, the originating carrier may sue the terminating carrier regardless of payment to an intermediate carrier if the amount paid is not the fair percentage.

CONCLUSION.

The decisions below are correct; there is no conflict; and the case does not present any important question of federal law requiring further review by this Court. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

A. H. KISKADDON,
OLIVER J. MILLER,
JACOB M. LASHLY,
Attorneys for Respondent.

LASHLY, LASHLY, MILLER & CLIFFORD,
Of Counsel.

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